HARPAJAN KAUR DELIB SINGH v. PP

HIGH COURT MALAYA, GEORGETOWN
MOHD RADZI ABDUL HAMID JC
[CRIMINAL APPEAL NO: PA-41S-16-11-2019]
23 DECEMBER 2020

CRIMINAL LAW: *Charges – Criminal charges – Offences under s. 29(1) of Minor Offences Act 1955 – Whether charges specified ingredients of s. 29(1) – Failure by accused person to give satisfactory explanation for large amounts of money found in bank account – Whether offence relates to 'fraudulent possession of property' – Absence of definition for 'property' or 'anything' – Whether 'property' must be able to be in possession of accused – Whether money in bank account was money of bank – Whether money in account recognised as chose in action – Whether account holder not in possession of money in account – Whether charge defective – Whether conviction of accused person a nullity*

CRIMINAL PROCEDURE: *Charges – Framing of – Offences under s. 29(1) of Minor Offences Act 1955 – Failure by accused person to give satisfactory explanation for large amounts of money found in bank account – Whether there can be 'possession' of monies in bank account – Whether money in bank account recognised as chose in action – Whether chose in action not 'thing' within contemplation and scope of 'possession' and 'property' under s. 29(1) – Whether charges based on fundamentally flawed understanding and application of law – Whether accused person misled and prejudiced – Whether charges defective – Whether curable by s. 156 or s. 422 of Criminal Procedure Code*

STATUTORY INTERPRETATION: *Construction of statute – Interpretation – Minor Offences Act 1955, s. 29(1) – Whether word 'property' under s. 29(1) includes monies held in bank account – Whether there can be 'possession' of monies in bank account – Absence of definition for 'property' or 'anything' – Whether 'property' must be able to be in possession of accused – Whether account holder not in possession of money in bank – Whether money in bank account recognised as chose in action – Whether chose in action not 'thing' within contemplation and scope of 'possession' and 'property' under s. 29(1) – Whether charge defective – Whether conviction of accused person a nullity*

The appellant's husband, Karnail, informed SP1, the complainant, that he could assist SP1 in securing a contract for the grass cutting and cleaning services at the National Service Training Programme Camp Kuala Kangsar and Lumut, Perak and requested SP1 to deposit certain amount of monies towards securing the award of the said contract. Consequently, between 27 January 2015 and 25 June 2015, SP1 had deposited a total sum of RM45,488 through six payments into a Public Bank Account No. 4606286306 ('account') belonging to the appellant. Upon finding himself without the award of the said contract, SP1 made a police report. The appellant was arrested and subsequently charged for three offences under

A s. 29(1) of the Minor Offences Act 1955 ('Act') for, *inter alia*, having in her account amount of monies for which she failed to satisfactorily account as to how she obtained the same. The appellant's defence was essentially that the account was opened for the benefit of Karnail who was a bankrupt. Karnail had possession of the ATM card and thus, control over the funds. B Since the account was for the benefit of her husband, the appellant claimed that she had no reason to be suspicious of the amount of monies deposited notwithstanding that the amounts were large. At the conclusion of the trial, the appellant was found guilty and sentenced to six months imprisonment under each charge, which were ordered to run concurrently. Hence, the C appellant appealed. The issues of law herein were: (i) whether the word 'property' under s. 29(1) of the Act includes monies held in a bank account; (ii) whether there can be 'possession' of monies in a bank account within the context of s. 29(1) of the Act; and (iii) if the answers to the issues were in favour of the appellant, was there an error or omission in stating the ingredients or particulars of the offence in the charges and whether the error D or omission could be saved by either s. 156 or s. 422 of the Criminal Procedure Code ('CPC').

Held (allowing appeal; setting aside conviction and sentence):

(1) The shoulder note to s. 29 of the Act describes the offence under that E section to be one that relates to 'fraudulent possession of property'. Section 29(1) of the Act uses the word 'anything' instead of 'property' in describing the ingredient of the offence. However, neither the word 'property' nor 'anything' is defined under ss. 2 and 29 of the Act nor the Interpretation Acts 1948 and 1967. Thus, in interpreting the meaning of F the word 'property' and 'anything', the words must be read and given meaning in the context of the provision and legislation. The reading of s. 29(1) of the Act shows that the word 'property' is hinged upon the word 'possession'. Such 'property' must be able to be in the possession of an accused. (paras 15, 19 & 21)

G **(2)** The contractual relationship between banker and customer is one of debtor and creditor, the bank being the debtor and the customer a creditor. Monies deposited by an account holder becomes the money of the bank. Thus, monies in an account is recognised as a chose in action and not corporeal property since monies in an account is a debt owed H by the bank to the customer. Since monies in a bank account is merely a chose in action, an account holder could not be said to be in possession of the monies held in a bank account and hence, is not the type of property that can be in the possession of an accused under s. 29(1) of the Act. (paras 22, 24 & 27)

I **(3)** The plain and ordinary meaning of a 'thing' as a noun refers to an object. If the legislators had intended the word 'property' to include both corporeal and incorporeal property, then the word 'property' would

have been used consistently throughout s. 29 of the Act without using also the words 'anything' or 'thing'. The deliberate use of the words 'anything' and 'thing' apart from the word 'property' in s. 29 of the Act, in particular s. 29(1) of the Act, were intended to refer to corporeal or tangible property and, for that reason, s. 29(4) of the Act must mean locations where a tangible and moveable property can be found. On the facts, and reading s. 29 of the Act as a whole, a chose in action is not a 'thing' that is within the contemplation and scope of 'possession' and 'property' under s. 29(1) of the Act. (paras 29 & 32)

(4) Since 'property' under s. 29(1) of the Act does not include intangible property such as a chose in action of which monies in a bank constitutes, there could not be an offence for possession of such property under that provision. The charges, based on a fundamentally flawed understanding and application of the law, were thus defective and were not curable by the application of s. 156 or s. 422 of the CPC. The charges did not establish an offence under the law and the trial was consequentially a nullity. The appellant was thus misled as the subject matter, *ie*, monies in the bank account, was not within the ambit of s. 29(1) of the Act to begin with, and that had prejudiced the appellant. This was not a case where there was an error or omission in stating the ingredient of the offence, but a case where the law did not apply to the facts in question. The appellant's conviction was a nullity. (paras 34 & 36-38)

Case(s) referred to:
Bekalan Sains P&C Sdn Bhd v. Bank Bumiputra Malaysia Bhd [2011] 1 LNS 232 CA ***(refd)***
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Che Man Che Mud v. PP [1994] 4 CLJ 823 HC ***(refd)***
Folley v. Hill [1848] II HLC 28 ***(refd)***
Gnanasegaran Pararajasingam v. PP [1997] 4 CLJ 6 CA ***(refd)***
Hari Bhadur Ghale v. PP [2012] 7 CLJ 789 FC ***(refd)***
Jason Chan Huan Sen & Ors v. PP [2015] 2 CLJ 605 CA ***(refd)***
Leow Nghee Lim v. Regina [1955] 1 LNS 53 HC ***(refd)***
Mohd Yusri Mangsor & Anor v. PP [2014] 7 CLJ 897 CA ***(refd)***
N Joachimson (A Firm Name) v. Swiss Bank Corporation [1921] 3 KB 110 ***(refd)***
Noor Ismahanum Mohd Ismail v. PP [2018] 10 CLJ 597 CA ***(refd)***
PP v. Dato' Sri Mohd Najib Hj Abd Razak [2020] 8 CLJ 319 HC ***(refd)***
PP v. Lawrence Tan Hui Seng [1993] 4 CLJ 221 SC ***(refd)***
PP v. Margarita B Cruz [1987] 1 LNS 129 HC ***(refd)***
R v. Davenport [1954] 1 All ER 602 ***(refd)***
Ravindran Ramasamy v. PP [2015] 3 CLJ 421 FC ***(refd)***
Rum Krishna Dalmia v. Delhi Administration AIR 1962 SC 1821 ***(refd)***
Shawal Hj Mohd Yassin v. PP [2006] 6 CLJ 392 HC ***(refd)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 FC ***(refd)***
Tebin Mostapa v. Hulba-Danyal Balia & Anor [2020] 7 CLJ 561 FC ***(refd)***
Toh Ah Loh & Mak Thim v. Rex [1948] 1 LNS 72 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 156, 422
Interpretation Acts 1948 and 1967, s. 17A
Minor Offences Act 1955, ss. 2, 29(1), (2), (3), (4), (6), (7), (8), (9)
Penal Code, ss. 383, 403, 404, 405, 406, 407, 408, 409, 409A, 409B, 410, 411, 420

Penal Code 1860 [Ind], s. 405

For the appellant - Gunaseelan S Thambinathan, Balwant Singh Purba Singh & Eng Yuh Pei; M/s Chan Eng & Co
For the respondent - Yasinnisa Begam Seeni Mohideen; DPP

[Editor's note: Appeal from Magistrate's Court; Criminal Trial No: PA-83-949-09-2018 (overruled).]

Reported by S Barathi

JUDGMENT

Mohd Radzi Abdul Hamid JC:

Matter Before This Court

[1] This an appeal ("appeal") by the appellant against both conviction and sentence. The appellant was charged for three offences under s. 29(1) of the Minor Offences Act 1955 ("Act"). The appellant was found guilty at the conclusion of the trial and was sentenced to six months' imprisonment under each charge which were to run concurrently.

[2] All the charges ("charge/charges") are as follows:

Pertuduhan Pertama

Bahawa kamu dari 27/01/2015 hingga 9/05/2015 bertempat di alamat 5G Lorong Delima 3, Island Glades, 11700 Gelugor, dalam Daerah Timur Laut, dalam Negeri Pulau Pinang, telah berada dalam milikan kamu sejumlah wang berjumlah RM22,528.00 di dalam akaun Bank Public Bank nombor 4606286306 milik kamu yang mana kamu tidak dapat memberi keterangan yang memuaskan tentang bagaimana kamu memperolehinya dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 29(1) Akta Kesalahan-Kesalahan Kecil 1955.

Pertuduhan Kedua

Bahawa kamu dari 20/5/2015 hingga 25/05/2015 bertempat di alamat 5G Lorong Delima 3, Island Glades, 11700 Gelugor, dalam Daerah Timur Laut, dalam Negeri Pulau Pinang, telah berada dalam milikan kamu sejumlah wang berjumlah RM16,180.00 di dalam akaun Bank Public Bank nombor 4606286306 milik kamu yang mana kamu tidak dapat memberi keterangan yang memuaskan tentang bagaimana kamu memperolehinya dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 29(1) Akta Kesalahan-Kesalahan Kecil 1955.

Pertuduhan Ketiga

Bahawa kamu 251612015 jam lebih kurang 17:30 hrs bertempat di alamat 5G Lorong Delima 3, Island Glades, 11700 Gelugor, dalam Daerah Timur Laut, dalam Negeri Pulau Pinang, telah berada dalam milikan kamu sejumlah wang berjumlah RM6, 780.00 di dalam akaun Bank Public Bank nombor 4606286306 milik kamu yang mana kamu tidak dapat memberi keterangan yang memuaskan tentang bagaimana kamu memperolehinya dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 29(1) Akta Kesalahan-Kesalahan Kecil 1955.

Brief Facts Of The Trial

[3] Sometime in 2014, SP1 (the complainant) was acquainted with one Karnail Singh a/l lndar Singh ("Karnail") through his friend known as one Patmendar Singh a/l Balkar Singh ("Patmendar"). Karnail is the husband of the appellant. Karnail had informed SP1 that he had befriended a military officer at the Ministry of Defence, Malaysia. Karnail claimed that through that relationship he could assist SP1 in securing a contract for the grass cutting and cleaning services at the National Service Training Programme Camp Kuala Kangsar and Lumut, Perak. SP1 was requested to deposit certain amount of monies towards securing the award of the said contract.

[4] Between the periods of 27 January 2015 and 25 June 2015, SP1 had deposited a total sum of RM45,488 through six payments into a Public Bank Account No. 4606286306 ("account"). The said account belonged to the appellant.

[5] By 26 November 2016, SP1 found himself without the award of the said contract and a police report was made. SP2 arrested the appellant as the owner of the account and SP3 conducted investigations. The appellant was consequently charged. A total of four witnesses were called for the prosecution.

[6] The appellant's defence was essentially that the account was opened for the benefit of Karnail who was a bankrupt. Karnail had possession of the ATM card and thus control over the funds. Since the account was for the benefit of her husband, the appellant claimed that she had no reason to be suspicious of the amounts of monies deposited notwithstanding that the amounts were large.

[7] At the end of the prosecution's case the Magistrate found that the prosecution had established a *prima facie* case against the appellant and at the conclusion of the trial, the Magistrate held that the prosecution had proven its case beyond a reasonable doubt against the appellant under each of the charge and that the appellant had failed to raise reasonable doubt in the prosecution's case.

[8] In his grounds of judgment appearing in vol. 1 of the record of appeal the Magistrate found that the appellant should have been suspicious of the deposit transactions given the value of the deposits and that the appellant could not have pleaded ignorance since it was found that there were cash withdrawals from the account made at the Public Bank counter and those withdrawals could have only been made by the appellant as the account holder. The Magistrate also found that the appellant had reasons to believe that the monies were stolen or fraudulently obtained but deliberately neglected or failed to enquire from Karnail the source of the funds since Karnail was a bankrupt. The Magistrate held that the appellant's explanation of the circumstances of the deposit of the monies was not plausible. Consequently the appellant was found guilty of the offences as charged and she was sentenced to an imprisonment term of six months under each charge to run concurrently. A stay of execution was obtained pending disposal of this appeal.

The Appeal

Grounds Of Appeal

[9] The appellant's petition of appeal rests on, *inter alia*, the following issues:

(i) that the Magistrate erred in fact and in law in not finding the charges as being defective since the charges did not specify as an ingredient under s. 29(1) of the Act that the monies were either stolen or fraudulently obtained and did not disclose the commission of any offence;

(ii) that the Magistrate erred in fact and in law in finding that the appellant had possession of the monies that were deposited into the account;

(iii) that the Magistrate erred in fact and in law in failing to call Karnail and Patmendar under s. 29(2) of the Act to offer an explanation regarding the monies;

(iv) that the Magistrate erred in fact and in law in finding that a *prima facie* case was established by the prosecution at the end of the prosecution's case and that the prosecution had successfully proven its case against the appellant beyond reasonable doubt at the conclusion of the trial;

(v) that the Magistrate erred in fact and in law in finding that the monies that were deposited by SP1 into the account were stolen or fraudulently obtained and that the Magistrate failed to consider the statement given by the appellant to the police and her testimony; and

(vi) that with regards to sentence, the sentence was excessive since the appellant was a first time offender.

Hearing Of The Appeal

Submissions By Appellant

[10] At the hearing of the appeal, arguments were presented based on the points stated in the petition of appeal. On the finding of guilt, the appellants contended, *inter alia*, that (i) the charges were defective because monies held in account is a chose in action and therefore it cannot come within the meaning of the word "anything" as provided in s. 29(1) of the Act; (ii) based on the principles of law of banking, monies in an account does not belong to the account holder and thus the holder of the account cannot be said to be in possession of the monies under s. 29(1) of the Act; (iii) possession under s. 29(1) of the Act refers to physical custody and control of a tangible object and not monies in an account; (iv) the framing of the charges are defective as they do not disclose an offence under s. 29(1) of the Act in that it did not state that the monies were either stolen or fraudulently obtained but merely in the possession of the appellant; (v) that the evidence of the prosecution witness SP1 and SP3 supported the defence of the appellant in that there was a satisfactory and reasonable explanation by the appellant on the circumstances of the opening and operation of the account; (vi) the appellant was prejudiced and deprived of a fair trial when the statement of Karnail to the police under s. 112 of the Criminal Procedure Code who was initially charged under s. 420 of the Penal Code and was later discharged not amounting to acquittal and which would have proved that the appellant was not involved in the affairs between Karnail, Patmendar and SP1 was not provided to the appellant despite requests made to the prosecution; (vii) the appellant was prejudiced and deprived of a fair trial when Patmendar who was instrumental in the transaction between Karnail and SP1 was not called as a witness for the prosecution nor offered as a witness to the defence; (viii) the Magistrate had erred when he placed a legal burden on the appellant to prove her innocence when the Magistrate held that the appellant had failed to call witnesses to support her case that she handed over monies that were withdrawn from the account to Karnail; and (ix) the Magistrate erred in finding that there was no reasonable explanation by the appellant as required under s. 29(1) of the Act when the requirements under that provision is that the thing must have either been stolen or fraudulently obtained.

Submissions By Respondent

[11] In counter-argument to the issues raised by the appellant, the respondent submitted, *inter alia*, that (i) although the word "anything" and "property" as used in s. 29 of the Act is not defined by the Act nor the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989), the reference to the definition of "property" found in other statutes such as the Dangerous Drugs (Forfeiture of Property) Act 1988, Insolvency Act 1967, Probate and Administration Act 1959 and Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001

show that property includes monies in account and for that reason this court must interpret the word "property" to include monies held in an account; (ii) that the word "possession" must also include both tangible and intangible property; (iii) although the charges did not specifically state that the monies were reasonably suspected to be stolen or fraudulently obtained, the appellant was not misled by that error as the prosecution had produced evidence consistent with proving the elements of the offence under s. 29(1) of the Act; (iv) that it was an indisputable fact that the account was in the name of the appellant, the monies that are the subject matter of the charges were proven to have been deposited into the account by SP1 and the appellant had withdrawn those monies from the Public Bank counter; (v) that the appellant had cause to reasonably suspect that the monies were either stolen or fraudulently obtained by Karnail given that he was a bankrupt and there was no evidence that he had any source of income; and (vi) thus the decision of the trial court in finding the appellant guilty of the offences was correct.

The Law Relating To Appeals

[12] In *Mohd Yusri Mangsor & Anor v. PP* [2014] 7 CLJ 897; [2014] 4 MLJ 875, Mohd Zawawi Salleh JCA (as he then was) had clearly set out the principles pertaining to the powers of an appellate court:

> [4] ... We are mindful that this is a factual based appeal. It is trite that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, there are exceptions. Where:
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> (a) the judgment is based upon a wrong premise of fact or of law;
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> (b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;
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> (c) the trial judge has completely overlooked the inherent probabilities of the case;
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> (d) that the course of events affirmed by the trial judge could not have occurred;
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> (e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or
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> (f) the trial judge had so fundamentally misdirected himself that one may safely sat that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion, then an appellate court will intervene to rectify that error so that injustice is not occasioned,
>
> then an appellate court will intervene to rectify that error so that injustice is not occasioned (see *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] 4 MLJ 149, (CA); *Sivalingam Periasamy v. Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545 (CA)).

Deliberations By This Court

Offence Under Section 29(1) Of The Act

[13] Section 29(1) of the Act states as follows:

> Any person who has in his possession or conveys in any manner anything which may be reasonably suspected of being stolen or fraudulently obtained shall, if he fails to account satisfactorily how he came by the same, be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding one year or to both.

[14] After hearing submissions from both the appellant and the respondent, this court finds that the crux of this appeal lies in the deliberation of the issues of law raised by the appellant. The issues of law are premised on the legality of the charges. If this court finds them in favor of the appellant, the outcome of this appeal would have been decided without need for further consideration on the issues of fact and evidence pertaining to the alleged commission of the offences. These issues of law are (i) whether the word "property" under s. 29(1) of the Act includes monies held in a bank account; (ii) whether there can be "possession" of monies in a bank account within the context of s. 29(1) of the Act; and (iii) if the answers to these issues are in favour of the appellant then was there an error or omission in stating the ingredients or particulars of the offence in the charges and whether the error or omission can be saved by either ss. 156 or 422 of the Criminal Procedure Code.

Rules Of Interpretation

[15] The shoulder note to s. 29 of the Act describes the offence under that section to be one that relates to "fraudulent possession of property". Section 29(1) of the Act then uses the word "anything" instead of "property" in describing the ingredient of the offence. Neither the word "property" nor "anything" is defined under s. 2, s. 29 of the Act nor the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989). Thus, in interpreting the meaning of these words, this court must be guided by established legal principles on interpretation of statutes.

[16] First and foremost, reference is made to s. 17A of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989). Section 17A clearly states that in the interpretation of a provision of an Act:

> ... a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[17] In *Hari Bhadur Ghale v. PP* [2012] 7 CLJ 789; [2012] 6 MLJ 597, the Federal Court stated as follows:

> [11] ... it is necessary to revert to some basic principles or canons of statutory interpretation.

A [12] Firstly, the object of statutory interpretation is to determine what the words of a statutory provision mean. It may be, *inter alia*, either by way of strict literal meaning, ordinary and natural meaning, the golden rule, the purposive approach (mischief rule), the value-based approach or the *ejusdem generis* rule.

B [13] Secondly, where the words are unambiguous, plain and clear they must be given their natural and ordinary meanings. 'It is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient or even unjust or immoral' (see *Public Prosecutor v. Sihabduin bin Hj Salleh & Anor* [1980] 2 MLJ 273: *Tan Weng* C *Chiang v. Public Prosecutor* [1992] 2 MLJ 625). Further, it should be borne in mind the '*dictum* that one should not twist and outstretch the language beyond its common usage', (see *Cheong Seok Leng v. Public Prosecutor* [1988] 2 MLJ 481 (also [1988] SLR 565)).

[14] Thirdly, 'that the words used in a section must be given their plain D grammatical meaning'. It is also an important rule that a statute should be construed as a whole. *Where the court is dealing with two sub-sections of a section, 'it is necessary that the two sub-sections must be construed as a whole 'each portion throwing light, if need be, on the rest'. The two sub-sections must be read as parts of an integral whole and as being inter-dependent.' It is not legitimate for the court to rewrite the subsections.* (see *Madanlal Fakirchand* E *Dudhediya v. Shree Changdeo Sugar Mills Ltd & Ors* AIR 1962 SC 1543; *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1987] 1 MLJ 39).

[15] Fourthly, 'that not just a single rule of interpretation should be contemplated, pursued and employed in interpreting any statute to the exclusion of all others; one should test the said single rule with other rules F and general presumptions wherever appropriate' (see *Kesultanan Pahang v. Sathask Realty Sdn Bhd* [1998] 2 MLJ 513).

[16] Fifthly, that in interpreting a penal provision any doubt therein should be given to the accused person. (emphasis added)

[18] More recently, in *Tebin Mostapa v. Hulba-Danyal Balia & Anor* G [2020] 7 CLJ 561; [2020] 4 MLJ 721, the Federal Court had set summarised the rules on the interpretation of statutes as follows:

[30] In our opinion, the rules governing statutory interpretation may be summarized as follows. First, in construing a statute, effect must be given to the object and intent of the Legislature in enacting the statute. H Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute. Second, if, however the words employed are I not clear, then the court may adopt the purposive approach in construing the meaning of the words used. Section 17A of the Interpretation Acts 1948 and 1967 provides for a purposive approach in the interpretation of statutes. Therefore, where the words of a statute are unambiguous, plain

> and clear, they must be given their natural and ordinary meaning. The statute should be construed as a whole and the words used in a section must be given their plain grammatical meaning. It is not the province of the court to add or subtract any word; the duty of the court is limited to interpreting the words used by the Legislature and it has no power to fill in the gaps disclosed. Even if the words in a statute may be ambiguous, the power and duty of the court "to travel outside them on a voyage of discovery are strictly limited." Third, the relevant provisions of an enactment must be read in accordance with the legislative purpose and applies especially where the literal meaning is clear and reflects the purposes of the enactment. This is done by reference to the words used in the provision; where it becomes necessary to consider every word in each section and give its widest significance. An interpretation which would advance the object and purpose of the enactment must be the prime consideration of the court, so as to give full meaning and effect to it in the achievement to the declared objective. As such, in taking a purposive approach, the court is prepared to look at much extraneous materials that bears on the background against which the legislation was enacted. It follows that a statute has to be read in the correct context and that as such the court is permitted to read additional words into a statutory provision where clear reasons for doing so are to be found in the statute itself.

[19] Thus, in interpreting the meaning of the word "property" and "anything", this court must read and give meaning to the words in the context of the provision and legislation. This court cannot without just reasons export in those words meanings that are not intended by that law merely to fill in the gaps. In another Federal Court decision of *Tan Boon Kean v. PP* [1995] 4 CLJ 456; [1995] 3 MLJ 514, Mohd Azmi FCJ in delivering the decision of the Federal Court stated thus:

> On interpretation of statutes, the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in any gaps disclosed. (See *Magor & St Mellons Rural District Council v. Newport Borough Council* [1952] AC 189 at p 191; [1951] 2 All ER 839 at p 842). The court has no power to change any words used by the legislature. Further, where the words are simple and clear, it is the duty of the court of law to give these words their natural meaning even though such interpretation leads to apparent anomalies.

Interpretation Of The Words "Property" And "Possession" And "Anything"

[20] As correctly submitted by the respondent, the word "property" as generally defined in law and as particularly found in the laws referred to by the respondent such as Dangerous Drugs (Forfeiture of Property) Act 1988, Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 and Probate and Administration Act 1959 and as demonstrated in the cases of *Noor Ismahanum Mohd Ismail v. PP* [2018] 10 CLJ 597; [2019] 2 MLJ 536; and *Jason Chan Huan Sen & Ors v. PP* [2015] 2 CLJ 605; [2015] 1 MLJ 701, include both tangible and intangible property.

A However, whether such scope of definition applies to s. 29 of the Act must, based on the rules of interpretation referred to above, be guided by the context and provision of the Act. This court cannot borrow or import the wide and specific definitions of the word "property" as found in the laws referred to by the respondent as these definitions serve the specific laws in B which those definitions are contained. To do that would be to provide an interpretation that may not have been originally intended to by the Act.

[21] Dealing with the word "property" first, this court holds the view that the reading of s. 29(1) of the Act shows that the word "property" is hinged upon the word "possession". Such "property" must be able to be in the C possession of an accused. Confining this court's attention to the subject matter of the charges in the present appeal, can monies in the account be in the possession of the appellant? The determination of that answer as argued by learned counsel for the appellant necessitates the consideration and understanding of the legal nature of monies held in a bank account as D established by the English cases of *Folley v. Hill* [1848] II HLC 28; 9 ER 1002 and *N Joachimson (A Firm Name) v. Swiss Bank Corporation* [1921] 3 KB 110.

[22] It is established law as propounded by the English case in *Folley v. Hill* (*supra*) and as accepted in Malaysia that the contractual relationship between banker and customer is one of debtor and creditor, the bank being the debtor E and the customer a creditor. Monies deposited by an account holder become the money of the bank. In *Bekalan Sains P&C Sdn Bhd v. Bank Bumiputra Malaysia Bhd* [2011] 1 LNS 232; [2011] 5 MLJ 1, the Court of Appeal held:

> [97] Now, what is the relationship between a banker and his customer? According to the House of Lords in *Edward Thomas Foley v Thomas Hill* F *and Others* (1848) 2 HL Case 28, the banker and customer relationship was essentially of debtor and creditor. In holding that the relationship of the banker and customer was one of debtor and creditor and not that of trusteeship, Lord Brougham had this to say at p. 44 of the report:
>
> > This trade of a banker is to receive money, and to use it as if it G were his own, he becoming debtor to the person who has lent or deposited with him the money to use as his own, and for which money he is accountable as a debtor. That being the trade of a banker, and that being the nature of the relation in which he stands to the customer, I cannot, without breaking down the bounds between equity and law, – without, as it were, removing H the land-marks of jurisprudence, – I cannot at all confound the situation of a banker with that of a trustee, and conclude that the banker is a debtor with a fiduciary character.

[23] In *R v. Davenport* [1954] 1 All ER 602, referred to in *Banking Law*, 3rd edn, by Poh Chu Chai, Lord Goddard CJ held that:

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> … There was no larceny here because in larceny there must be an asportation. I think the fallacy that led to this charge of stealing money was this. It was thought that, because the master's account became

> debited, that was enough to make a theft, but, although we talk about people having money in a bank, the only person who has money in a bank is the banker. If I pay money into my bank, either by paying cash, or a cheque, that money at once becomes the money of the banker.
>
> The relationship between banker and customer is that of debtor and creditor. He does not hold my money as an agent or trustee. The leading case of *Foley v. Hill* exploded that idea. When the banker is paying out, whether in cash over the counter or whether by crediting the bank account of somebody else, he is paying out his own money, not my money, but he is debiting me in my account with him. I have a chose in action, that is to say, I have a right to expect that the banker will honour my cheque but he does it out of his own money. Therefore, this money paid on these cheques was the banker's money, though it led to the customer's account being debited.

[24] Thus, monies in an account is recognised as a chose in action and not corporeal property since monies in an account is a debt owed by the bank to the customer (see p. 441 of *Criminal Law in Malaysia and Singapore*, 3rd edn, by Stanley Ho). In the case of *Che Man Che Mud v. PP* [1994] 4 CLJ 823; [1994] MLJU 354, the court held:

> A person has a RM100 currency note. That is movable property. He deposits the note at a bank and gets an acknowledgment of credit in a bank deposit book. The bank deposit book is movable property, but the fact, as evidenced by the credit in the deposit book, that the bank owes him money to the value of RM100 is not movable property. This is not the same as having a RM100 note in the deposit book. The person does not have a RM100 note. All that he has is the right to claim the RM100 note or its equivalent from the bank. That right is not corporeal property.

[25] Hence, since monies in an account is an incorporeal or intangible property and stands in debit in favour of the account holder, can the owner of that account be said to be in "possession" of that monies? In *Leow Nghee Lim v. Regina* [1955] 1 LNS 53; [1956] 1 MLJ 28, Taylor J stated:

> The word "possession" is one of the most difficult of English words. It is derived from *posse* to be able and *sedere* to sit or occupy. The fundamental concept is power of occupation; primarily this referred to land and later the meaning was extended to power of user of a chattel. The primary lay meaning of possess is to hold as property, to own. The primary legal meaning of possess is to have possession, as distinct from ownership. This is well illustrated by the popular phrase for a sheriff's agent, "A man in possession," who really has only custody. Shakespeare more accurately called him a bum bailiff. In this Ordinance custody is distinguished, and I think "possession" means possession irrespective of whether the possessor is the beneficial owner. Probably the most helpful definition of possession is:
>
> > The relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing admits, to the exclusion of other persons.

[26] In the oft-quoted case of *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] 1 MLJ 237, the court held:

> In my experience there is no question which Magistrates find more difficult to deal with than this question of what amounts to "possession" for the purposes of the criminal law. Much of this difficulty arises from a failure to appreciate that in reality there are two separate questions involved. The first is whether the accused party was in possession of the article in question and the second by reason of the application of the maxim *actus non facit reum nisi mens sit rea* is whether he had knowledge of the nature of the thing possessed.
>
> "Possession" itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Edn, p. 304):
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> > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

[27] Since monies in a bank account is merely a chose in action this court agrees with the appellant that an account holder cannot be said to be in possession of monies held in a bank account and hence is not the type of property that can be in the possession of an accused under s. 29(1) of the Act. (see *Che Man Che Mud* (*supra*))

[28] That an intangible property such as a chose in action cannot have been intended by the legislators to be within the ambit of under s. 29 of the Act can also be seen through the provisions of s. 29(4), (6), (7), (8) and (9) of the Act where the Legislature had envisaged that the property could be searched and found in geographical and physical locations such as a buildings and modes of transport. Learned Deputy Public Prosecutor argued that the word "includes" in s. 29(4) of the Act served to provide a wider meaning of where the possession of the property can be found and it was not a limitation to locating monies in a bank account. To this argument, this court states that equal attention must also be given to the words "anything" used in s. 29(1) and (2) of the Act and the word "thing" used in s. 29(3) of the Act:

> (1) Any person who has in his possession or conveys in any manner **anything** which may be reasonably suspected of being stolen or fraudulently obtained shall, if he fails to account satisfactorily how he came by the same, be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding one year or to both.
>
> (2) If any person charged with having or conveying **anything** stolen or fraudulently obtained declares that he received the same from some other person, or that he was employed as a carrier, agent or servant to convey the same for some other person, the Magistrate may

cause every such other person, and also, if necessary, every former or pretended purchaser or other person through whose possession the same has passed, provided that such other person is alleged to have had possession of the same within the jurisdiction of such Magistrate, to be brought before him and examined, and may examine witnesses upon oath touching the same.

(3) If it appears to such Magistrate that any person so brought before him had possession of **such thing** and had reasonable cause to believe the same to have been stolen or fraudulently obtained such person shall be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding one year or to both.

(emphasis added)

[29] The plain and ordinary meaning of a "thing" as a noun refers to an object (see https://dictionary.cambridge.org/dictionary/english/thing) If the legislators had intended the word "property" to include both corporeal and incorporeal property, then in this court's view the word "property" would have been used consistently throughout s. 29 of the Act without using also the words "anything" or "thing". As an illustration, when one reads Chapter XVII of the Penal Code on offences against property, in particular, referring to ss. 403 to 411 of the Penal Code on criminal misappropriation of property, criminal breach of trust and receiving stolen property, the word "property" is consistently used in each of those provisions without any use of other words to refer to that property. Although the word "property" is not defined under the Penal Code, it has been established by judicial decisions that unless specifically provided (see s. 378 on theft of movable property) "property" includes both corporeal property and incorporeal property including chose in action (see ss. 405 and 409 on criminal breach of trust and decided cases for example *PP v. Lawrence Tan Hui Seng* [1993] 4 CLJ 221; *Gnanasegaran Pararajasingam v. PP* [1997] 4 CLJ 6; and *PP v. Dato' Sri Mohd Najib Hj Abd Razak* [2020] 8 CLJ 319). Notwithstanding that the word "anything" is found in ss. 383 (extortion) and 410 (stolen property) of the Penal Code, those words have specific references within the context of that provision. In s. 383 the word "anything" refers to something that is signed and sealed that can be converted into valuable security, whilst in s. 410 "anything" refers to a thing that is acquired by the conversion or exchange of a stolen property. Returning to s. 29 of the Act, the words "anything" and "thing" must therefore be read in the context of that provision. In this court's view the deliberate use of the words "anything" and "thing" apart from the word "property" in s. 29 of the Act, in particular s. 29(1) of the Act, were intended to refer to corporeal or tangible property and for that reason s. 29(4) of the Act must mean locations where a tangible and moveable property can be found.

[30] Learned Deputy Public Prosecutor sought to argue by referring to *Chan Pean Leon v. PP* (*supra*), *Leow Nghee Lim v. Regina* (*supra*) and *Toh Ah Loh & Mak Thim v. Rex* [1948] 1 LNS 72; [1949] 1 MLJ 54 that since the

appellant had opened the account and had the accompanying right to administer the account, to deposit or withdraw any monies then it is the appellant who has knowledge, control and custody of the monies in the account and not the bank. Thus, the appellant had possession over the same. This court declines to agree with the respondent for the reason that the respondent had failed to make a distinction between the issue of possession and ownership. In this court's opinion whilst an account holder may have ownership of monies in a bank account, in real terms the monies become the monies of the bank as clearly propounded by *Folley v. Hill* (*supra*) and the bank stands as a debtor to the account holder. The account holder does not have possession of the monies until the bank physically pays out the monies to the account holder. Until that happens, as stated earlier, the account holder merely has a right in a chose in action.

[31] It would be imperative for the sake of a fuller discussion on the issue to refer at this point to the Indian Supreme Court decision in *Rum Krishna Dalmia v. Delhi Administration* (1963) SCR (1); AIR 1962 SC 1821. In that case, one of the points argued was that monies in a bank account was a chose in action and therefore it was an immovable property and thus cannot be a property within the ambit of s. 405 of the Indian Penal Code which is equivalent to s. 405 of the Malaysian Penal Code (on criminal breach of trust). In expressing the view that the word "property" in that provision includes both movable and immovable property which covers also a chose in action, the Supreme Court stated as follows:

> Mr. Dingle Foot contends that no offence of criminal breach of trust has been committed as the funds of the Bharat Insurance Company in the Bank do not come with the expression "property" in s. 405 l.P.C. It is urged that the word "property" is used in the Indian Penal Code in different senses, according to the context, and that in s. 405 it refers to movable property and not to immovable property or to a chose in action.
>
> It is then contended that the funds which a customer has in a bank represent closes in action, as the relationship between the customer and the banker is that of a creditor and a debtor, as held in Attorney General for *Canada v. Attorney General for Province of Quebec & Attorneys General for Saskatchewan*, *Alberta & Manitoba* (1) and in *Foley v. Hill* (2).
>
> Reliance is also placed for the suggested restricted meaning of property in s. 405 I.P.C. on the cases *Reg. v. Girdhar Dharamdas* (3); *Jugdown Sinha v. Queen Empress* (4) and *Ram Chand Gurvala v. King Emperor* (5) and also on the scheme of the Indian Penal Code with respect to the use of the expressions "property" and "movable property" in its various provisions.
>
> The learned Solicitor General has, on the other hand, urged that the word "property" should (1) [1947] A.C. 33. (2) [1848] 2 H.L.C. 28 9 E. R. 100. (3) [1869] 6 Bom. High Ct. Rep. (Crown Cases) 33. (4) (1895) 1.L.R. 23 Cal. 372. (5) A.I.R. 1926 Lah 385 be given its widest meaning and that

> the provisions of the various sections can apply to property other than movable property. It is not to be restricted to movable property only but includes chose in action and the funds of a company in Bank.
>
> We are of opinion that there is no good reason to restrict the meaning of the word "property" to movable property only when it is used without any qualification in s. 405 or in other sections of the Indian Penal Code Whether the offence defined in a particular section of the Indian Penal Code can be committed in respect of any particular kind of property will depend not on the interpretation of the word "property" *but on the fact whether that particular kind of property can be subject to the acts covered by that section. It is in this sense that it may be said that the, word property in a particular section covers only that type of property with respect to which the offence contemplated in that section can be committed.* (emphasis added)

[32] Thus, guided by the views expressed by the Supreme Court of India in the afore-referred case, this court is fortified in holding the view that on the facts of the present appeal and reading of s. 29 of the Act as a whole, a chose in action is not a "thing" that is within the contemplation and scope of "possession" and "property" under s. 29(1) of the Act.

[33] Learned Deputy Public Prosecutor also endeavoured to persuade this court to adopt the view that since the Act was enacted in the 1950's, the interpretation of the word "property" must be given a meaning that is consistent with the development of banking practices and the extensive use of bank accounts and services that is currently prevalent. In response to this argument, this court need only refer to the rules of interpretation alluded to earlier. The reasons offered by the respondent for this court to justify giving the widest interpretation to the word is simply not tenable when looking at the provision of s. 29 of the Act as a whole, the employment of the words "possession", "anything" and "thing" and the established legal principles under the law of banking regarding the nature of monies held in a bank account. The interpretation of a penal provision cannot be blind to the relevancy and application of legal principles in other areas of the law that are pertinent to the subject matter of the provision under consideration and therefore must be interpreted within the relevant context. Further, any doubt on a penal provision must be given in favor of the accused (see *Hari Bhadur Ghale v. PP* (*supra*))

[34] Returning to all the charges in the present appeal, since this court holds the view that "property" under s. 29(1) of the Act does not include intangible property such as a chose in action of which monies in a bank constitutes, there cannot be an offence for possession of such property under that provision. The charges were therefore wrongfully brought against the appellant and is therefore illegal.

[35] In *PP v. Margarita B Cruz* [1987] 1 LNS 129; [1988] 1 MLJ 539, KC Vohrah J held:

> I have time and again exhorted DPPs and magistrates to read the provision in the Act which creates the offence especially in regard to unfamiliar charges, and to scrutinize the charge with which the accused is charged. This charge under the Passport Act is not the sort of charge that comes up often and it is with precisely this sort of charge that the magistrate should have called for the statute from the prosecuting officer or from the library to check the provision under which the charge was made. If the law is not read, how would the magistrate then be able to find out the essential ingredients which constitute the charge? And if a magistrate does not know what the ingredients of the charge are, how is he or she able to explain the charge to the accused? It behoves all magistrates and presidents to scrutinize the charges, to read the provision of the statute under which the charge is framed, to understand the constituent ingredients of the charge, to know the nature of the punishment and appreciate the gravity of the charge. If the charge is defective or badly framed, the magistrate should point out the defects and request the prosecuting officer to amend the charge as the accused should truly understand the nature of the charge he is asked to plead to (see *Lim Beh v. Opium Farmer* (1808?84) 3 Ky 10; *Jagar Singh v. Public Prosecutor* [1936] MLJ 114).
>
> Prosecuting officers and magistrates should also heed the advice of Thomson J. (as he then was) in the case of *Public Prosecutor v. Syed Bakri* [1955] MLJ xvii as to how a charge should be framed. (See also *Public Prosecutor v. Lim Yoo Hock* [1984] 1 MLJ 309.)
>
> Then again, when the prosecuting officer gives the facts relating to the charge implicating the accused where the accused has pleaded guilty, the magistrate should be vigilant to see that the facts make out the ingredients relating to the charge and where the accused states facts which show that one or more of the essential ingredients have not been made out, then notwithstanding the plea of guilty, the magistrate should reject the plea and fix a date for evidence to be adduced at a trial.

[36] Since the charges were made based on a fundamentally flawed understanding and application of the law, the charges must therefore be defective and cannot be cured whether by the application of ss. 156 or 422 of the Criminal Procedure Code. The charges did not establish an offence under the law and the trial was consequentially a nullity. In *Shawal Hj Mohd Yassin v. PP* [2006] 6 CLJ 392; [2006] 4 MLJ 334, Azahar Mohamed JC (as he then was) held:

> [12] ... In my view s 156 has application only in a situation where there is an error either in stating the offence or the particulars required to be stated in the charge or there is an omission to state the offence or those particulars. In other words that section provides for a cure should there be any non-compliance with the technical provisions of the law. I do not think that provision can be invoked in the case at hand in a situation

where the charge was defective as disclosing no offence under the section of the Act. I do not consider that this is an irregularity curable under s. 156. In the same way, the application of s. 422 is constrained to remedy no more than technical defects in the charge. To me where a trial in the court below is conducted on the basis of a charge which is defective as not disclosing an offence under the relevant section, it is an illegality which cannot be cured by s. 422 ...

[13] The defect in the charge was a matter of substance and not merely of form. This was not a mere technical non-compliance of any provision of the law, which can be condoned as an irregularity. I do not think it can be cured without causing injustice to the appellant. In my view, this was not a defect, disregarding it would not occasion a miscarriage of justice. To me the charge as framed did not disclose any offence and therefore I have no doubt that the defect of this kind was an illegality. I think the appellant was left in doubt as to the offence of which he had been convicted and sentenced. It is a fundamental principle of criminal law in our country that an accused person should know accurately of what offence he has been convicted and sentenced. In my judgment the error in the charge did cause prejudice and injustice to the appellant. In the end, I have no hesitation in saying that the charge framed against the appellant was bad in law. When looked in this way, one can see that there has been a substantial miscarriage of justice. As a consequence, the conviction in this case was a nullity.

[37] Guided by the decision in *Shawal Hj Mohd Yassin* (*supra*) this court cannot agree with the argument of the respondent that the appellant was not misled by all the charges since she had defended the charges at the trial. Plainly the appellant was misled when the subject matter that is monies in a bank account was not within the ambit of s. 29(1) of the Act to begin with and that surely prejudiced the appellant. This is not a case where there was an error or omission in stating the ingredient of the offence but a case where the law did not apply to the facts in question. As stated by the Federal Court in *Ravindran Ramasamy v. PP* [2015] 3 CLJ 421; [2015] 6 MLJ 509:

[32] The following cases did not draw the distinction between particulars and ingredients. But they nonetheless exemplify that ss. 156 and/or 422 would not be invoked to cure an error or omission in stating the ingredients of an offence.

[33] In *Chong Chee Pak v. PP* [1948] 1 LNS 94; [1948-1949] Supp MLJ 45, where the appellant was convicted on a charge of "assisting in the management of a public lottery", an offence not known in law, Callow J held that the conviction was a nullity (see also *Quek Ching Kim v. Regina* [1955] 1 LNS 104; [1956] 1 MLJ 54, *Lee Swee Tee v. PP* [1960] 1 LNS 58; [1960] 1 MLJ 161, where the respective charge under the Common Gaming Houses Ordinance was similarly wrongly worded, and where the conviction was either quashed and or set aside).

[34] In *Teo Peng Chow & Ors v. PP* [1957] 1 LNS 88; [1957] 1 MLJ 118, Buhagiar J said that where there was an error in the ingredients of the charge, it could not be said that the accused was not misled:

> The next point to consider is whether this error in the charge is material or not and whether the provisions of section 156 of the Criminal Procedure Code applies. Under that section an error in a charge is not material unless the accused was in fact misled by such error or omission. It seems from the grounds of judgment of the learned Magistrate that he did not consider the words in the charge referred to above were an essential ingredient in an offence under section 10 but he did not amend the charge at the close of the case for the prosecution and at that stage counsel for the defendant submitted that there was no case to answer on the ground that there was "no evidence to show that the accused managed or assisted in the management of the club and no evidence that all three accused arranged a meeting on behalf of the club." Under the circumstances I do not think it can be said that the appellants were not misled by the error in the charge. I, therefore, set aside the conviction and sentence and order re-trial before another Magistrate.

[35] And in *C Mohammad v. PP* [1973] 1 LNS 9; [1974] 1 MLJ 25, Syed Agil Barakbah J, as he then was, held that as the charge disclosed no offence known to law, it was not "necessary nor desirable for me to consider the provisions of the Criminal Procedure Code as urged by the learned Deputy Public Prosecutor because there (was) an apparent miscarriage of justice".

[36] Other like cases, where the charge disclosed no known offence and where the conviction was quashed and or set aside, were (i) *Periasamy & Anor v. PP* [1993] 3 CLJ 46; [1993] 2 MLJ 551; (ii) *Tay Leong Siak v. PP* [2002] MLJU 197, where the charge did not follow the wording of the law that created the offence, and where Low Hop Bing J, as he then was, said that the charge was so defective as to render it an illegality such that it was impossible to invoke ss. 156 and 422 of the CPC; (iii) *Hazraf Ali Hassan v. PP* [2011] 1 LNS 829; [2012] 7 MLJ 355, where Akhtar Tahir J held that s. 156 does not apply where the defect in the charge does not disclose any known offence, and that the accused was "prejudiced by being ignorant of the actual nature of the offence committed by him. As such he would be unable to properly defend himself"; and (iv) *PP v. Mohamad Sabu* [2012] 5 CLJ 246; [2012] 7 MLJ 547, where Zamani A Rahim J held that the omission of ingredient is a fundamental defect that could not be cured by s. 422.

Decision

[38] In conclusion, after hearing all submissions presented before this court and based upon the deliberations set out above, this court finds that the all the charges were fundamentally defective, bad in law and incurable. On that basis, this court further finds that the Magistrate had erred in finding that a

prima facie case was established by the prosecution. There was no judicial appreciation of whether the law applied to the facts stated in the charges. The defence should not have been called and the conviction was a nullity.

[39] For those reasons, this appeal is allowed without need for this court to consider the other issues presented in this appeal. Conviction and sentence is hereby set aside.